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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act)

CC Docket No. 93-252

Regulatory Treatment of)
Mobile Services)

COMMENTS OF CENCALL COMMUNICATIONS CORPORATION

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COMMENTS OF CENCALL COMMUNICATIONS CORPORATION

CenCall Communications Corporation ("CenCall"), by its attorneys and pursuant to the Commission's Notice in this proceeding,¹ hereby submits its comments concurring with the comments submitted by the American Mobile Telephone Association ("AMTA"), but emphasizing that (1) Congress has given the Commission authority to establish different classes or categories of commercial mobile service providers and to promulgate regulations that vary by class or category; and (2) the Commission should exercise its authority to forbear from applying Title II of the Communications Act to Enhanced Specialized Mobile

¹ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Notice of Proposed Rulemaking, CC Docket No. 93-252 (Rel. October 8, 1993) ("Notice").

Radio Service carriers in the event that such carriers are determined to be commercial mobile service providers.

I. Introduction and Summary

CenCall is an operator and manager of Specialized Mobile Radio Services in the Rocky Mountain, Midwest and Pacific Northwest regions of the United States ("Operating Regions") and intends to provide Enhanced Specialized Mobile Radio Services. CenCall's activities have traditionally been considered as private land mobile services and therefore "private" rather than "common" carriage under the Communications Act of 1934, as amended.²

The Omnibus Budget Reconciliation Act of 1993 changed the regulatory framework of mobile services by amending Sections 3(n) and 332 of the Communications Act.³ As directed by the Budget Act, all mobile services are to be divided into "private mobile services" and "commercial mobile services." Services classified as private mobile services will continue to be treated as private carriage under the Communications Act. Those services treated as commercial mobile services will be treated as common carriage under the Communications Act.

In the Notice, the Commission seeks comment on its proposals for discharging its duty to promulgate regulations implementing

² 47 U.S.C. §§ 1, et seq. ("Communications Act").

³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (August 10, 1993) ("Budget Act").

Sections 3(n) and 332, as amended by the Budget Act. In particular, the Commission seeks comment on (1) the definitional issues raised by the Budget Act; (2) the identification of various services, including Personal Communications Services, affected by the new legislation and the proposed regulatory treatment of those services; and (3) the provisions of Title II of the Communications Act that should be applied to "commercial mobile services."⁴

In its comments, AMTA generally agrees with the Commission's proposed approach to the rulemaking. CenCall concurs in those comments. CenCall wishes to emphasize, however, that: (1) Congress has given the Commission authority to establish different classes or categories of commercial mobile service providers and to promulgate regulations that vary by class or category; and (2) the Commission should exercise its authority to forbear from applying Title II of the Communications Act to Enhanced Specialized Mobile Radio Service carriers if they are determined to be commercial mobile service providers.

⁴ See Notice at ¶ 2.

II. Congress Has Given the Commission Authority to Establish Different Classes or Categories of Commercial Mobile Services Providers and to Promulgate Regulations That Vary by Class or Category

Section 332(c)(1)(A) of the Communications Act, as amended, provides that a commercial mobile service provider shall "be treated as a common carrier for purposes of this Act, except for such provisions of Title II as the Commission may specify by regulation as inapplicable to that service or person." The Notice requests comment on whether Section 332(c)(1)(A) authorizes the Commission to establish classes or categories of commercial mobile services and to promulgate regulations that vary by class or category.⁵ The Notice also requests comment on whether Section 332(c)(1)(A) authorizes the Commission to establish regulatory requirements that differ for individual service providers within a class.⁶ Finally, the Commission proposes to establish three basic categories of commercial mobile service providers for purposes of promulgating regulations: (1) certain common carrier mobile services; (2) certain PCS services; and (3) certain private mobile services.⁷

CenCall submits that the statute and legislative history give the Commission ample authority to not only establish different regulatory classes, but to establish different

⁵ Notice at ¶ 54.

⁶ Id.

⁷ Id.

regulatory requirements for providers within a class.⁸ The Conference Committee stated as follows:

For instance, the Commission may, under the authority of this provision, forbear from regulating some providers of commercial mobile services if it finds that such regulation is not necessary to promote competition or to protect consumers against unjust or unreasonable rates or unjustly or unreasonably discriminatory rates. At the same time, the Commission may determine that it should not specify some provisions as inapplicable to some commercial mobile services providers, or may choose to "unspecify" certain provisions for certain providers, if it determines, after analyzing the market conditions for commercial mobile services, that application of such provisions would promote competition and protect consumers.⁹

Thus, the Commission clearly has authority to not only establish different regulatory classes, but to establish different regulatory requirements for providers within a class. CenCall submits that the Commission should exercise that authority as described below.

III. The Commission Should Exercise Its Authority to Forbear From Applying Title II of the Communications Act to Enhanced Specialized Mobile Radio Service Carriers in the Event that they are Determined to be Nondominant Commercial Mobile Service Providers

The Conference Report describing the Budget Act contemplated that, in order for the Commission to forbear from enforcement of any of the provisions of Title II of the Communications Act against commercial mobile service providers, other than Sections 201, 202 and 208, the Commission must determine that three

⁸ H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 491.

⁹ Id. at 496.

conditions exist: (1) enforcement of the provision is not necessary in order to ensure that charges are reasonable, (2) enforcement of the provision is not necessary for the protection of consumers and (3) forbearance is consistent with the public interest.¹⁰

The legislative history of Section 332 states specifically that:

Section 332(c)(1)(C) of the Conference directs the Commission to review and analyze competitive market conditions with respect to commercial mobile services in its annual report . . . [A]s part of determining whether a provision is consistent with the public interest . . . , [the Commission] shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions. If the Commission determines that such regulation will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation is in the public interest.¹¹

In determining whether to forbear from regulation, Section 332(c)(1)(C) requires the Commission to:

[R]eview competitive market conditions with respect to commercial mobile services . . . Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition.

The Commission's long-standing historical policy has been to forbear from enforcing the provisions of Title II in those

¹⁰ 47 U.S.C. 332(c)(1)(A).

¹¹ Conference Report at 491.

instances where it is not only unnecessary to ensure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends."¹² This same reasoning applying to the issues addressed in the context of this rulemaking.

As discussed in the Notice, emerging carriers such as Enhanced Specialized Mobile Radio Service Providers are presumed by the Commission to lack the market power to control prices or to discriminate unreasonably.¹³ Thus, CenCall submits that the Commission should forbear from regulating those carriers.

¹² Memorandum Opinion and Order, CC Docket No. 93-36, para. 12 (Rel. Aug. 18, 1993) (MO&O). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further Notice); Second Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,701 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993; Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 96 FCC 2d 1020 (1985) (Sixth Report), rev'd, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir. 1985) (MCI v. FCC). Although in MCI v. FCC the court reversed the Commission's forbearance of the Communication Act's tariff requirements, Congress clearly gave the Commission such authority in this instance.

¹³ See Notice at ¶¶ 51-52.

Similar to its analysis in the Competitive Carrier proceeding, the Commission specifically asks in the Notice for the following comment on whether the public interest would be served by forbearance from application of Sections 203, 204, 205, 211 and 214 of Title II.

A. Section 203 - Tariff Requirement

Section 203 of the Communications Act requires the advance publication of prices and other terms and conditions in a tariff. The Commission has recognized that the tariff requirements:

[have] worked the perverse effect of imposing a measure which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation.¹⁴

Thus, the Commission has long advocated forbearance of the tariff requirements¹⁵ even while recognizing that the requirement of tariff publication imposed by Section 203 is one of the major requirements of the Communications Act.¹⁶

B. Section 204 - Hearings as to Lawfulness of New Charges; Suspension

Section 204 of the Communications Act provides that the Commission may upon complaint or on its own motion initiate a

¹⁴ Competitive Carrier Further Notice at ¶ 87.

¹⁵ See supra n. 12.

¹⁶ See, e.g., American Telephone and Telegraph Co. v. Federal Communications Commission, 978 F.2d 727 (D.C. Cir. 1992); MCI Telecommunications Corp. v. Federal Communications Commission, 765 F.2d 1186 (D.C. Cir. 1985). See also, Maislin Indus., U.S. Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (interpreting tariffing provision of Interstate Commerce Act).

hearing as to the lawfulness of any new or revised charge, classification, regulation, or practice, and then suspend the rate under certain conditions. This provision goes hand-in-hand with the Section 203 tariff requirement, as well as the Section 211 contract requirement discussed below.¹⁷ Thus, if the tariff and contract requirements of the Communications Act are forborne, CenCall agrees with the Commission that forbearance of Section 204 would be in the public interest for the same reasons that forbearance of Section 203 would be in the public interest.

C. Section 205 - Tariff Prescription Authority

Section 205 of the Communications Act permits the Commission, after a Section 204 hearing, to establish reasonable rates and charges for carriers in violation of the Communications Act. Like Section 204, Section 205 goes hand-in-hand with the obligations imposed by the tariff requirements of Section 203.

Thus, in Competitive Carrier, the Commission stated:

Based on accepted economic principles as well as our experience in the tariff review process, we demonstrated that these [nondominant] carriers' rates are circumscribed by a range between their costs and the price permitted by this agency to be charged by the dominant carriers.¹⁸

CenCall agrees with the Commission's analysis that forbearance of Section 205 would be in the public interest and urges the Commission to apply that analysis to Enhanced

¹⁷ Id. at ¶ 100.

¹⁸ Id. at ¶ 103.

Specialized Mobile Service carriers if it is determined that they are commercial mobile service providers.

D. Section 211 - Filing of Contracts

Section 211 of the Communications Act requires that copies of "all contracts, agreements or arrangements with other carriers, or with common carriers not subject to the provisions of this Act" must be filed with the Commission. In the Notice, the Commission proposes to forbear from imposing the requirements of Section 211 on commercial mobile service providers.¹⁹ As the Commission has discussed at length in the Competitive Carrier proceedings, carriers such as Enhanced Specialized Mobile Radio Service providers are presumed to price in reasonable ranges.²⁰ CenCall therefore submits that the Commission should forbear from imposing the requirements of Section 211 on such carriers.

E. Section 214 - Licensing Requirements

Section 214 of the Communications Act regulates the entry and exit of common carriers from the market by requiring that certain carriers submit applications to the Commission for the provision of new facilities or the discontinuance of existing facilities. In Competitive Carrier, the Commission explained the purpose of Section 214:

¹⁹ Notice at ¶ 62.

²⁰ See Competitive Carrier Further Notice at ¶ 103.

We attempt to guard against such higher charges by our oversight of the investments of dominant carriers. Only ratepayers who are captives of monopoly communications service providers will pay the cost of unnecessary or unwise facilities construction or the expenses incurred by the dominant carrier in the form of increased rates. The shareholders, not the customers, of nondominant carriers must bear the burden of improvident investment decisions, because customers upon whom such charges are levied will seek out alternatives, more efficient suppliers charging lower rates.²¹

The Commission also explained the harmful effect on competition that application of Section 214 could have:

Certification procedures can actually deter entry of innovative and useful services. They can be abused by competitors to delay or block innovation. The presence of Section 214 barriers to exit may also deter potential entrants. The time involved in the decertification process may impose additional losses on a carrier after competitive circumstances make a particular service uneconomic. The cost of imposing artificial exit constraints is without any concomitant benefit in competitive markets, since reasonable alternatives are available to continue service.²²

The analysis that the Commission engaged in with respect to AT&T versus other exchange carriers regarding exit and entry procedures under Section 214 is equally apt in this case. Here, Enhanced Specialized Mobile Radio Service Carriers such as CenCall should also be free of these procedures.²³

F. Other Provisions of Title II of the Communications Act

With respect to the other provisions of Title II of the Communications Act that may apply to common carriers, such as Sections 210, 212, 213, 215, 218, 219, and 221, the Commission

²¹ Id. at 115.

²² Id. at 117.

²³ See supra n. 14.

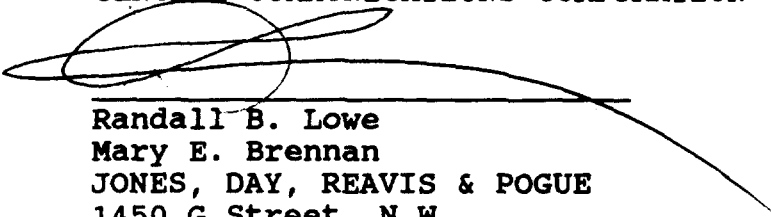
proposes to forbear from enforcing these sections for any commercial mobile services provider. For the reasons cited above with regard to the other sections Title II, CenCall would urge the Commission to forbear from enforcing these provisions for Enhanced Specialized Mobile Radio Service Carriers if they are determined to be commercial mobile service providers.

IV. Conclusion

In conclusion, CenCall agrees with the Commission's proposals to establish different classes or categories of commercial mobile service providers and to promulgate regulations that vary by class or category. CenCall submits that based on such authority, the Commission should forbear from regulating Enhanced Specialized Mobile Radio Service carriers if they are determined to be commercial mobile service providers.

Respectfully submitted,

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